IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA

Plaintiffs,

v.

TOM VILSACK, in his official capacity as Secretary of Agriculture; and UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendants.

CV-16-41-GF-BMM-JTJ

FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

I. Synopsis

Defendants filed a Motion to Dismiss, a Motion to Dismiss for Failure to State a Claim, and a Motion to Stay. (Doc. 19.) Plaintiffs filed a Motion for Summary Judgment or in Alternative for a Preliminary Injunction and a Motion for a Temporary Restraining Order. (Docs. 21; 27.)

Regarding Defendants' motions, the Court finds that Plaintiffs have standing and have stated a claim upon which relief can be granted. The Court also finds that staying the case would be inappropriate.

Regarding Plaintiffs' motions, the Court finds that questions of fact concerning whether the federal government effectively controls the Montana Beef Council preclude summary judgment at this time. The Court also finds, however, that Plaintiffs have met their burden establishing that preliminary injunctive relief is appropriate. Finally, the Court finds that there will be no gap in time between when the district court considers Plaintiffs' Motion for Preliminary Injunction and their Motion for a Temporary Restraining Order.

Accordingly, the Court recommends that the district court deny Defendants' Motions to Dismiss and Motion to Stay, deny Plaintiffs' Motion for Summary Judgment, grant Plaintiffs' Motion for Preliminary Injunction, and deny Plaintiffs' Motion for a Temporary Restraining Order as moot.

II. Factual Background

The Beef Promotion and Research Act of 1985 imposes an assessment of $1.00-per-head of cattle each time cattle are sold. 7 U.S.C. § 2901 *et. seq*. The assessments, also known as checkoffs, fund beef related promotional campaigns. The Beef Act allows qualified state beef councils (QSBC) to collect these assessments.

To become a QSBC, an entity must (1) certify to the federal Cattleman's Beef Production and Research Board (Beef Board) that it will engage in similar promotional activities as both Beef Board and Beef Committee; (2) submit a report to the Beef Board outlining how it will collect and process assessments; (3) certify to the Beef Board that it will in fact collect and process the assessments; (4) certify to the Beef Board that it will remit the assessments to the Beef Board; (5) certify to the Beef Board that it will submit annual reports indicating the amount of assessments collected and remitted; and (6) not use assessments for improper practices or acts. 7 C.F.R. § 1260.181(b). In Montana, the QSBC is the Montana Beef Council (MBC).

Once the MBC collects the assessments, it sends 50 cents from every dollar to the Beef Board. The MBC retains the remaining 50 cents to fund its promotional activities. Until recently, there was no mechanism for a cattle producer to direct the MBC to send their entire assessment to the Beef Board. Now, a cattle producer may request that, after MBC collects its assesment, the MBC direct its full assessment to the Beef Board.

The MBC is a private entity. No state law created the it. Likewise, there is no state law requiring cattle producers to contribute to it. The MBC uses the assessments it collects to fund advertising campaigns that promote the consumption of beef without distinguishing between domestic and foreign beef products. Because Plaintiffs represent domestic cattle producers, they disagree with MBC's lack of distinction between foreign and domestic beef.

The federal government exerts some level of oversight over the MBC and other QSBCs. The government ensures that the MBC uses its portion of the assessments to fund promotion and research as well as to provide consumer and industry information via a one-time certification and an annual review of the MBC's accounting records. Yet, the MBC's board alone directs and determines its promotional activities.

III. Analysis

1. Defendant's Motions to Dismiss

Defendants filed a Motion to Dismiss arguing Plaintiffs lack standing and fail to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. 19.) Defendants argue that Plaintiffs' complaint fails to establish that Plaintiffs have standing for three reasons: (1) the complaint fails to name a single member of the organization who suffered harm; (2) the alleged harm to Plaintiffs is self-inflicted; and (3) a favorable decision would not redress the alleged injury. (*Id.* at 17.) Defendants argue that Plaintiffs fail to state a claim because federal law does not compel Plaintiffs to subsidize the MBC's advertisements.

A. Motion to Dismiss for Lack of Standing

In order for a plaintiff to have standing to bring a lawsuit, the Constitution requires (1) that the plaintiff has suffered an injury-in-fact and not merely a conjectural or hypothetical injury; (2) the injury is fairly traceable to the action of the defendants; and (3) a likelihood that the relief the plaintiff requests will redress the alleged injury. *Steel Co. v. Citizens for a Better Env't,* 523U.S. 83, 103-104 (1998). An association may exert standing on behalf of its members when (1) its members would have standing to bring the suit on their own; (2) the lawsuit is relevant to the association's purpose; and (3) the claim and relief requested does not require the individual members to participate in the action. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

Defendants argue that Plaintiffs needed to name individual members who would have standing. But at this stage in the litigation, Supreme Court precedent requires that a court "presume that the general allegations in the complaint encompass the specific facts necessary to support" standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). Furthermore, Plaintiffs filed declarations from a sample of their members who they allege are forced to fund the MBC. (Doc. 23 Exs. 2-5.) The Court finds this is sufficient to meet the procedural requirements at this stage of the litigation.

Defendants next argue that the injuries Plaintiffs allege are self-inflicted because Plaintiffs have the ability to submit a request to the MBC to have it direct the entire amount of their assessment to the Beef Board. The First Amendment does not allow private entities to fund speech by exacting loans from individuals when those individuals disagree with the speech. *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2292-93 (2012). When an exaction violates the First Amendment, "there is no way to justify an opt out requirement." *Id*. Accordingly, the Court finds that the Plaintiffs' ability to request that their entire assessment go to the Beef Board does not remove the injury of having their assessment go towards funding speech, via a forced loan, that is contrary to the Plaintiffs' mission.

Finally, Defendants argue that an injunction preventing compelled subsidies of the MBC would not redress Plaintiffs' injuries. (Doc. 19) The Court disagrees. Plaintiffs allege that the First Amendment prohibits the payment of assessments to private entities to fund speech contrary to Plaintiffs' mission. It follows that an injunction directing that, in the absence of a member's prior affirmative consent that the MBC may retain 50 cents of each dollar collected, the entire Beef Checkoff assessment to go directly the Beef Board would cure the First Amendment injury. Therefore, this Court finds that litigation may redress the injuries Plaintiffs allege.

Consequently, this Court finds that Plaintiffs' members have satisfied the requirements for standing. Under the facts Plaintiffs allege, they have suffered an injury in fact that is linked to the action of Defendants, and a court may redress this injury by issuing an injunction. This Court likewise finds that this litigation is relevant to Plaintiffs' purpose of promoting the sale of Montana beef. Finally, the Court also finds that this litigation does not require the participation of Plaintiffs' individual members because they all would allege identical harm and would seek the same remedy. Accordingly, this Court recommends that the district court deny Defendant's Motion to Dismiss for Lack of Standing.

B. Motion to Dismiss for Failure to State a Claim

Defendants filed a Motion to Dismiss for Failure to State a Claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. 19.) Defendants argue that because Plaintiffs may request that the MBC send Plaintiffs' entire assessment to the Beef Board, there is no compelled speech and no First Amendment violation. The Court disagrees.

The First Amendment prohibits the government from compelling individuals to subsidize a private message when the individuals disagree with that message. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005). The Supreme Court has rejected the argument that the presence of an opt-out provision alleviates First Amendment concerns. *Knox*, 132 S.Ct. at 2293. Therefore, this Court finds that the presence of an opt-out provision is not fatal to Plaintiffs' claim and recommends that the district court deny Defendants' Motion to Dismiss for Failure to State a Claim.

2. Defendants' Motion to Stay.

Defendants filed a motion to stay this action pending completion of the United States Department of Agriculture (USDA)'s ongoing rulemaking concerning the procedure for cattle producers to direct that the full amount of their assessments go to the Beef Board. (Doc. 19.) Defendants argue that it would be inefficient for the parties to brief and the Court to decide the constitutionality of the procedure when the procedure may change as a result of the rulemaking process. (Doc. 19 at 29.) Defendants also argue it would be improper for the Court to prejudge the options available to the USDA before the agency finalizes the rule. *Id*. Finally, Defendant's argue the rulemaking may result in amendments to the procedure that would make Plaintiffs' concerns moot or alter the issues before the court. *Id*. Defendants do not, however, provide a time frame for completion of the rulemaking process.

A court may stay an action pending resolution of independent proceedings that may effect the case before it if it finds a stay would be more efficient for the court or fairer to the parties to the action. *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979). While the USDA's pending rulemaking may ultimately moot Plaintiffs concerns with the procedure for directing the MBC to send their full assessments to the Beef Board, the record before the Court does not indicate a time frame for completion of the rulemaking process. The Court finds that staying this action indefinitely would be unfair to the Plaintiffs. Therefore, the Court recommends that the district court deny Defendants' Motion to Stay.

3. Plaintiffs' Motion for Summary Judgment, Motion for Preliminary Injunction, and Motion for Temporary Restraining Order.

Plaintiffs filed a Motion for Summary Judgment, a Motion for a Preliminary Injunction, and a Motion for a Temporary Restraining Order. (Doc. 21; Doc. 27.) Plaintiffs argue that the undisputed facts show that they are entitled to judgment as a matter of law because the MBC is a private entity that is not effectively controlled by the federal government. Plaintiffs also argue that a preliminary injunction is appropriate because they are likely to prevail on the merits of their claim and are suffering irreparable harm when the MBC uses half of Plaintiffs' members' assessments to fund speech contrary to Plaintiffs' mission. Finally, Plaintiffs seek a temporary restraining order preventing the MBC from using their assessment to fund its advertising until the district court rules on their Motion for a Preliminary Injunction.

A. Motion for Summary Judgment

Plaintiffs argue they are entitled to summary judgment because the undisputed facts show that the MBC's use of Plaintiffs' members' assessments to fund speech that Plaintiffs disagree with violates the First Amendment. (Doc 22.) Defendants argue that there is no First Amendment violation because Plaintiffs may opt-out of the MBC's advertising, and regardless, the MBC's advertising is government speech and therefore not subject to First Amendment protection. (Doc. 41.) Although, as discussed above, this Court finds that the opt-out provision does not remedy Plaintiffs First Amendment concerns, the Court finds that summary judgment is inappropriate at this point because there are issues of fact regarding whether MBC's advertising constitutes government speech.

The Court shall grant summary judgment only if the movant shows there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The party moving for summary judgment has the initial burden of showing there is no genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The substantive law determines which facts are material; only disputes over facts that might affect the outcome of the suit under the governing law properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012).

If the moving party makes a prima facie showing that summary judgment is appropriate, the burden shifts to the opposing party to show the existence of a genuine issue of material fact. *Id*. On summary judgment, all inferences should be drawn in the light most favorable to the party opposing summary judgment. *Id*. at 159.

First Amendment law concerning compelled speech governs Beef Checkoff assesments. Compelled speech includes situations where individuals are not compelled to speak but instead are required to "subsidize a private message with which they disagree." *Johanns*, 544 U.S. at 557. If the checkoff program compels an individual to support a private association, there is a violation of the individual's First Amendment rights. *Id.* at 559 (quoting *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)). Individuals do not, however, have a First Amendment right not to fund government speech. *Id.* at 562. Instead, citizens must use the political process to compel the government to change a position they disfavor. *Id*. Whether the message of a private entity is government speech turns on whether the private entity is "effectively controlled" by the government. *Delano Farms*, 586 F.3d at 1226.

Here, the parties disagree on the level of control the government exerts over the MBC. (*See* Doc. 22 at 16; Doc. 39 at 15.) Defendants argue the government has the statutory authority to control the message of the MBC. (Doc. 39 at 22.) Plaintiffs argue that no such authority exists. (Doc. 22 at 17.) This Court finds that this question of fact is material to this case. Accordingly, this Court finds that, based upon the record currently before it, summary judgment is not appropriate and recommends that the district court deny Plaintiffs' Motion for Summary Judgment.

B. Motion for Preliminary Injunction

Plaintiffs filed a Motion for Preliminary Injunction arguing that when a plaintiff establishes an ongoing First Amendment violation, courts should resolve the equitable considerations their favor. (Doc. 22 at 27.) Defendants argue that injunctions that would alter the status quo, such as the one Plaintiffs seek, are disfavored and that courts should only grant the injunction when the facts and law clearly cut in the plaintiff's favor. (Doc. 39 at 26.)

Preliminary injunctive relief requires that a plaintiff show that (1) it is likely to succeed on the merits; (2) it will suffer irreparable harm; (3) the balance of equities cut in its favor; and (4) the injunction is in the public interest. *Winter v.*

Nat. Res. Def. Council, 555 U.S. 7, 22 (2008). As the defendants note, the law disfavors injunctions that would alter the status quo; courts should deny such motions "unless the facts and law clearly favor the moving party." *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir. 1994).

As discussed above, if Defendants can show that the federal government exerts enough control over the speech of the MBC that the MBC's speech is effectively government speech, there is no violation of Plaintiffs' First Amendment rights. The Court finds that it is unlikely that the government exerts enough control over MBC's speech to qualify the speech as government speech.

In *Johanns v. Livestock Mktg. Ass'n*, the United States Supreme Court analyzed whether the advertising campaigns conducted by the Beef Board and Beef Committee Constituted government speech. *Johanns*, 544 U.S. at 553. The Court held that the Beef Board and Beef Committee's speech was government speech because their speech was "from beginning to end the message established by the Federal Government." *Id.* at 560. The *Johaans* court noted that the Secretary of Agriculture had the authority to approve every word of the Beef Board and Beef Committee's campaigns. *Id.* at 561. The *Johaans* court also noted federal officials participated in the development of the campaigns. *Id*. The *Johaans* court did not address whether QSBC's advertising campaigns constitute government speech.

Based on the record before it, the Court finds that Defendants likely do not exert the same level of control over MBC's speech as they do over the Beef Board and Beef Committee. Nothing in the record indicates that federal officials participate in the creation of MBC's advertising campaigns. Likewise, there is no evidence the government approves every word of MBC's campaigns. Absent that level of control, the Court finds that it is unlikely MBC's speech is government speech. Given that is the dispositive issue in this case, the Court finds that

Plaintiffs are likely to prevail on the merits of their claim. Accordingly, the Court finds that Plaintiffs have satisfied the first element preliminary injunctive relief requires.

The Court likewise finds that Plaintiffs satisfy the remaining requirements for preliminary injunctive relief. The Court finds that every time that the MBC uses part of Plaintiffs' assessment to fund speech Plaintiffs disagree with, Plaintiffs suffer irreparable harm. This Court also finds that the equitable considerations cut in Plaintiffs' favor because of the fundamental rights at issue here. Finally, because preliminary injunctive relief would remedy a potential constitutional harm to all Montana beef producers, this Court finds injunctive relief is in the public interest. Therefore, this Court finds that Plaintiffs have shown preliminary injunctive relief is appropriate and recommends that the district court grant Plaintiffs' Motion for Preliminary Injunction.

C. Motion for Temporary Restraining Order

Plaintiffs filed a Motion for a Temporary Restraining Order seeking to have the Court enjoin the MBC from holding or using any part of Plaintiffs' assessment until the Court rules on Plaintiffs' Motion for Preliminary Injunction. (Doc. 27.) Because the district court will consider both the Motion for Preliminary Injunction and the Motion for Temporary Restraining Order simultaneously, there will be no gap in time between the ruling on the motions. Therefore, this Court finds that Plaintiffs' Motion for a Temporary Restraining Order is moot and recommends that the district court deny the motion.

IV. Conclusion

Plaintiffs allege facts sufficient to show that they have standing to bring their claim. Plaintiffs' complaint is also sufficient to survive Defendants' Rule 12(b)(6) motion. The Court also finds that staying this action indefinitely pending completion of the USDA's rule making process is improper. There are, however, issues of material fact concerning whether the federal government exerts enough control over the MBC to make MBC's speech government speech. This precludes summary judgment in favor of Plaintiffs. Nevertheless, Plaintiffs have met their burden to show that preliminary injunctive relief is appropriate. Finally, because the district court will consider Plaintiffs' Motion for a Preliminary Injunction and Motion for a Temporary Restraining Order simultaneously, the Motion for a Temporary Restraining Order is moot.

For the reasons outlined above, this Court **FINDS:**

I. Plaintiffs have standing to bring their claims.

II. Plaintiffs state a claim upon which relief can be granted.

III. Staying the action indefinitely pending the USDA's rulemaking process would be unfair to Plaintiffs.

IV. Questions of fact regarding the level of control the government has over the MBC preclude summary judgment.

V. Plaintiffs met their burden to show that preliminary injunctive relief is appropriate.

VI. Plaintiffs' Motion for a Temporary Restraining Order is moot.

Accordingly, this Court **RECOMMENDS** that the district court:

I. Deny Defendants' Motion to Dismiss for lack of standing;

II. Deny Defendants' Motion to Dismiss for Failure to State a Claim;

III. Deny Defendants' Motion to Stay;

IV. Deny Plaintiffs' Motion for Summary Judgment;

V. Grant Plaintiffs' Motion for Preliminary Injunction and enjoin Defendants from continuing to allow the MBC to utilize assessments it collects under the federal Beef Checkoff program to fund its advertising campaigns unless a cattle producer provides prior affirmative consent that the MBC may retain a portion of the producer's assessment to do so; and

VI. Deny Plaintiffs' Motion for Temporary Restraining Order as moot.

Dated the 12th day of December 2016.

John Johnston
United States Magistrate Judge